IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION TO PROCEED IN FORMA PAUPERIS

FRANK O. BELL, JR.
State Public Defender

MONICA KNOX
Chief Assistant
State Public Defender

1390 Market Street, Suite 425
San Francisco, California 94102
Telephone: (415) 557-9670

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Cases

Statute

Jury Instruction

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,	)
v.	)
ALBERT GREENWOOD BROWN, JR., Respondent.	)

ON PETITION FOR A WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, ALBERT GREENWOOD BROWN, Jr., respectfully requests that this Court deny the petition for a writ of certiorari.

A. Introduction

Petitioner seeks certiorari attacking the California Supreme Court's resolution of two issues: the propriety of giving an anti-sympathy instruction to a jury at the penalty trial of a capital case and the propriety of instructing the jury that if aggravating circumstances outweigh mitigating circumstances they "shall" impose death. The former issue, however, does not raise any important federal question; and

the latter issue is not relevant to the determination of the case.

B. The Mitigating Evidence and the Instruction

The jury herein was instructed not to consider sympathy in deciding between life and death for respondent. (CT 319; RT 6559.)[1/] Following state precedent, the California Supreme Court held that such an instruction is not appropriate at the penalty phase of a capital trial. (People v. Brown, 40 Cal.3d 512, 538 (1985).)

In holding it was error to instruct the jury to disregard sympathy, the California Supreme Court did cite United States Supreme Court authority. (Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976).) Such an instruction, however, was established as error in California long before Eddings, Lockett, and Woodson were decided. (People v. Bandhauer, 1 Cal.3d 609, 618-619 (1970); People v. Polk, 63 Cal.2d 443, 451 (1965); People v. Friend, 47 Cal.2d 749, 767-768 (1957).) Although the California Supreme Court has noted that the Bandhauer, Polk, and Friend results have been reinforced by Eddings, Lockett, and Woodson (People v. Easley, 34 Cal.3d 858 (1983)), that suggests only that California is respecting the bounds of federal law and does not mean the state rule is no longer viable independent of what the federal rule may be. Indeed, in its continued reliance on Bandhauer, the California Supreme Court has implicitly indicated its reliance on a state rule which predates and is independent of any federal rule. Under such circumstances, this Court should not view the citation of federal authority as the reliance on

1. Respondent will use the same citation form to the record as petitioner has; "CT" refers to the Clerk's Transcript, and "RT" refers to the Reporter's Transcript.

federal law only. (See Delaware v. Van Arsdall, __ U.S. __ (April 7, 1986), Stevens, J., dissenting.)

Petitioner attacks the holding of the California Supreme Court, arguing it is appropriate to remove sympathy from the jury's consideration. Petitioner, however, has framed the issue more narrowly than either the facts of the case or the California Supreme Court's opinion justifies. The real issue here is whether the jury was advised it could consider the mitigating evidence presented by respondent.

In recent years the California Supreme Court has discussed and refined the scope of discretion held by the jury at a penalty trial. The court has held that the Constitution requires and the state statute allows consideration of evidence relative to the defendant's character and background and the sympathetic response that evidence may evoke. (People v. Easley, supra, 34 Cal.3d 858.) In the present case, the California Supreme Court evaluated the jury instructions which implement the statute and found them defective. In doing so, the court interpreted state instructions meant to carry out the directive of a state statute. Whether or not the instructions are flawed under federal constitutional law, they are flawed under state law as failing to implement the state statute as interpreted by the state high court. The interpretation of the statute and the implementing instruction is a matter solely for the state court.

A review of the evidence and the instructions in this case reveals the jury was precluded from considering the mitigating evidence presented by respondent.

At the penalty trial, respondent produced evidence from relatives indicating respondent had been a quiet, passive, sometimes troubled child. (RT 6240, 6261, 6273, 6290.) A psychiatrist testified respondent suffered from severe

ifficult childhood and
education. (RT 6402-
testified he was
id he asked the jury
00, 6507.) It cannot,
dent had a right to
ddings v. Oklahoma,
, supra, 438 U.S.

tand their right to
that right in instruc-
ollows:

been found
The charge
special cir-
be true.

it the penalty
r of the first
in the State
f parole in
tance charged
true.

u must now
ll be imposed

sentiment,
ice, public

ant have
ientiously
pply the
ich a just
iences of

to be
nsider all
d during
ou shall
ded by the

ime of which
in the present
e of any special
ue.

psychosexual problems resulting from a difficult childhood and a grossly inadequate and misleading sex education. (RT 6402-6414.) Additionally, respondent himself testified he was ashamed of his prior criminal conduct, and he asked the jury to show mercy for him. (RT 6494, 6498-6500, 6507.) It cannot, at this late date, be doubted that respondent had a right to have the jury consider this evidence. (Eddings v. Oklahoma, supra, 455 U.S. 104, 114; Lockett v. Ohio, supra, 438 U.S. 586, 604.)

The jury, however, would understand their right to consider the evidence only if advised of that right in instructions. Here the jury was instructed as follows:

> "The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been specially found to be true.
>
> "It is the law of this State that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the State Prison for life without possibility of parole in any case in which the special circumstance charged in this case has been specially found true.
>
> "Under the law of this State, you must now determine which of said penalties shall be imposed on the defendant.
>
> "You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.
>
> "Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.
>
> "In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> "(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental distress or defect or the effects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

"It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

"After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

"If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.

"However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose the sentence of confinement in the State Prison for life without the possibility of parole."
(CT 319-322; RT 6558-6562.)

Thus, the jury was told to restrict their consideration to factors relating to the offenses and to disregard any sympathetic feelings engendered by the evidence respondent presented. "[I]t was as if the trial judge had instructed [the] jury to disregard the mitigating evidence." (Eddings v. Oklahoma, supra, 455 U.S. 104, 114.) As this Court has held: "The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." (Id., at pp. 114-115.)

Petitioner claims the list of factors the jury is allowed to consider (CALJIC 8.84.1)[2/] was held to be consistent with Lockett and Eddings in California v. Ramos, 463 U.S. 992 (1983). That is not so. Ramos suggested that California Penal Code, § 190.3 is consistent with Lockett in that it allows the defendant to present any relevant mitigating evidence. (Id., at p. 1005, fn. 19.) The problem, of course, is that although the statute permits the introduction of evidence, the instructions do not allow for the consideration of that evidence.[3/]

---

2. The California Supreme Court has interpreted CALJIC 8.84.1 as not allowing consideration of the character and background of the offender but rather restricting consideration to the circumstances of the offense. (People v. Easley, supra, 34 Cal.3d 858.) That is an interpretation of a state jury instruction promulgated by a state statute. The California Supreme Court should have the last word on such an interpretation; this Court should not get involved in interpreting California state statutes or the implementing instructions.

3. The relevant statutes in Eddings and Lockett allowed the defendants to present any mitigating evidence; this Court recognized, however, that such statutes did not necessarily allow for consideration of that evidence by the sentencer. (Eddings v. Oklahoma, supra, 455 U.S. 104, 114-115 and fn. 10.)

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court noted that juries are "unlikely to be skilled in dealing with the information they are given" at a penalty trial and recognized the importance of careful instructions to advise the jury how to evaluate evidence as it relates to the applicable law. (Id., at pp. 192-193.) Here no instruction advised the jury they could consider respondent's mitigating evidence.

It is appropriate for the jury to consider feelings of compassion or sympathy engendered by the evidence. (Woodson v. North Carolina, supra, 428 U.S. 280, 304.) Yet the instructions herein told the jury they could not consider such feelings. Petitioner contends the instruction advises the jury only to put aside feelings of "mere" sympathy. Petitioner misreads the instructions.

The instruction tells the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Read fairly, however the "mere" modifies only sentiment and not sympathy and the other terms. If "mere" modified all the terms, the jury would be told not to consider, for example, "mere prejudice," implying prejudice itself was a proper consideration as long as it rose above the level of "mere prejudice." Such a reading, however, is absurd. The logical reading is that no prejudice, passion, or sympathy of any kind may be considered.

Petitioner suggests an anti-sympathy instruction is appropriate because Furman v. Georgia, 408 U.S. 238 (1972) requires that the penalty determination be based on factors related to the offense and the offender. California, however, has consistently rejected the concept of untethered sympathy requiring rather that sympathy be tied to the mitigating evidence. (See, e.g., People v. Easley, supra, 34 Cal.3d 858, 876.) Given the mitigating evidence respondent produced

here, any feelings of sympathy would clearly be related to the facts. Moreover, the anti-sympathy instruction was not restricted to factually untethered sympathy.

The anti-sympathy instruction here was not likely to be overlooked by the jury. The prosecutor set out from the beginning of trial to prevent any defense or mitigating use of sympathy. During voir dire he made the jurors promise they would put aside any feelings of sympathy or pity for respondent. (See, e.g, RT 553-554, 3163, 3203.) Then, after getting the trial court to agree to instruct against sympathy, the prosecutor drove the point home in his closing argument, reminding the jury of their promises and obligation not to consider sympathy. (RT 6522-6523.)

Finally, the jury here was told not to consider the consequences of their decision. (CT 319; RT 6559.) Jurors at a penalty trial, however, are supposed to act "with due regard for the consequences of their decision . . . ." (McGautha v. California, 402 U.S. 183, 208 (1971); see also Caldwell v. Mississippi, __ U.S. __, 86 L.Ed.2d 231 (1985).)

Jury instructions must be considered as a whole and with the presumption that jurors "attend closely to the particular language" and "carefully follow" them. (Francis v. Franklin, __ U.S. __, 85 L.Ed.2d 344, 360, fn. 9 (1985).) When the jury instructions herein are considered, it becomes clear that the jurors were essentially instructed to disregard the mitigating evidence that formed the basis for respondent's plea for his life. The California Supreme Court did nothing more than recognize that fact; it did not establish any new law or make any remarkable or significant interpretation of the settled law.[4/]

---

4. Petitioner would have this Court believe that the decision of the California Supreme Court herein places in [fn. cont.]

C. California Penal Code section 190.3

Petitioner also seeks certiorari to review the California Supreme Court's interpretation of California Penal Code section 190.3. The California Supreme Court suggested that the standard jury instructions given at a penalty trial should be modified to make clear to the jury the scope of its sentencing discretion. (People v. Brown, supra, 40 Cal.3d 512, 545 and fn. 17.)

The court's comments on this issue, however, formed no part of the basis for reversing respondent's death judgment. Indeed, the court never discussed the statute or instruction as it related to respondent or his case. The California Supreme Court reversed respondent's death judgment for an entirely unrelated reason.

This Court would be rendering an advisory opinion if it sought to resolve the issue of the constitutional interpretation of California Penal Code section 190.3. In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that an opinion would be advisory "if the same judgment would be rendered by the state court after we corrected its view of federal laws." (Id., at p. 1042.) Since the California Supreme Court reversed respondent's death judgment for a reason unrelated to its interpretation of Penal Code section 190.3, its decision would remain unchanged even if this Court decided the state court's

---

4. [Fn. cont.]

jeopardy over 150 death judgments. It has been clear since 1983 that it is error to give the jury an anti-sympathy instruction. (People v. Easley, supra, 34 Cal.3d 858.) The instruction was not in widespread use prior to that (this case represents only the third matter that the California Supreme Court has reviewed in which the instruction was given since California reintroduced capital punishment in 1977); and presumably trial courts have followed the law since 1983 and refrained from giving such an instruction. Thus, the present decision will impact on few, if any, other death judgments.

interpretation was not required as a matter of federal law.[5]

Moreover, in interpreting Penal Code section 190.3, the California Supreme Court was construing a state statute. Respondent argued in the state court that an aspect of the death penalty statute and its implementing instruction was unconstitutional. The California Supreme Court rejected that challenging by recognizing that the potentially ambiguous statute was subject to interpretive clarification. (40 Cal.3d at pp. 541-542.) The interpretation adopted by the California Supreme Court was based, in part, on the perceived intent of the drafters of the statute and the plain langauge of the statute. (40 Cal.3d at p. 545.) That analysis will not change regardless of what this Court might say about the constitutional propriety of the statute. The state high court is free to make, as it did, its own interpreation of a state statute based on its plain meaning and apparent intent. As this Court has noted, "the inquiry is irrelevant whether we would construe the statute in the same way if the duty of construction were ours and not another's." (Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 362 (1932).)

---

5. The reversal of respondent's death judgment was based on the California Supreme Court's holding that the instructions did not allow for consideration of the mitigating evidence. Petitioner, of course, is asking this Court to review that part of the decision also. If this Court were to hold the instructions given were consistent with federal law, it would remand to the California Supreme Court for reconsideration of that issue on state grounds. At that point, the state Supreme Court would also be able to consider, if necessary, the other issues raised by respondent in his initial briefing but not considered by the court since they addressed the issue upon which reversal was granted. (See 40 Cal.3d at p. 545.) Thus, respondent's death judgment may still be reversed without regard to or consideration of the constitutional interpretation of Penal Code section 190.3.

This case does not present any federal constitutional issue "in a manner which warrants the exercise of the certiorari jurisdiction of this Court." (Murel v. Baltimore City Criminal Court, 409 U.S. 355, 357 (1972).)

D. Conclusion

For the foregoing reasons, respondent respectfully requests this Court to deny the petition for certiorari.

DATED: April 18, 1986

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender

MONICA KNOX
Chief Assistant
State Public Defender

Attorneys for Respondent

MK:a

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, ALBERT GREENWOOD BROWN, Jr., by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to rule 46. Respondent has at all times during the pendency of the above-referenced matter in the trial and appellate courts of the State of California been represented by appointed counsel due to respondent's indigency.

Respondent is presently incarcerated in San Quentin State Prison. His affidavit in support of this motion is attached.

DATED: April 18, 1986

Respectfully submitted,

FRANK O. BELL, JR.
State Public Defender

MONICA KNOX
Chief Assistant
State Public Defender

Attorneys for Respondent

MK:a

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

ALBERT GREENWOOD BROWN, JR.,
Respondent.

DECLARATION OF
ALBERT GREENWOOD BROWN, JR.

I, ALBERT GREENWOOD BROWN, JR., being duly sworn, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the respondent in the above-entitled matter.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am presently incarcerated and have been since November 1980; I receive no income from earnings and have no cash or checking or savings accounts.

3. I am unable to give security for said cause.

//

//

4. Counsel was appointed to represent me at trial, on my direct appeal, and on these post-appeal proceedings.

ALBERT GREENWOOD BROWN, JR.

State of California)
County of Marin) s.s.

The foregoing affidavit of Albert Greenwood Brown, Jr., was subscribed and sworn to before me this 17th day of April, 1986.

NOTARY PUBLIC

My commission expires:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1563

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
v.
ALBERT GREENWOOD BROWN, JR.,
Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis, by depositing said brief in the United States Mail, postage prepaid and properly addressed to John K. Van de Kamp, Attorney General, Jay Bloom, Deputy Attorney General, 110 West "A" Street, Suite 700, San Diego, California 92101, and Clerk, California Supreme Court, 4250 State Building, 455 Golden Gate Avenue, San Francisco, California 94102.

All parties required to be served have been served.

Dated this 18th day of April, 1986, at San Francisco, California.

EZRA HENDON
Deputy State Public Defender
Office of the State Public Defender
1390 Market Street, Suite 425
San Francisco, California 94102